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Before the
Federal Communications Commission
Washington, D.C. 20554

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| **In the Matter of**<br><br>**Review of the Commission's Regulations Governing Broadcasting**<br><br>**Television Satellite Stations Review of Policy and Rules** | **MM Docket No. 91-221**<br><br>**MM Docket No. 87-8** |

ASSOCIATION OF LOCAL TELEVISION STATIONS

# PETITION FOR RECONSIDERATION SUBMITTED BY THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.


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## Petition for Reconsideration
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## *Executive Summary*


The FCC's decision in this proceeding was a step in the right direrction. Nonetheless, the benefits of the decision do not necessarily accrue to small markets. We urge the Commission to make the following modifications to the *Report and Order*.

- Permanently grandfather all existing local marketing agreements. This includes all local marketing agreements entered into prior to the adoption date of the *Report and Order*.

- Eliminate the "eight independent voice standard."

- To the extent the Commission decides to continue applying a voice standard, then all competing media should be counted as a voice. This includes cable television, DBS, MMDS, radio, newspapers, magazines and the Internet.

- The waiver process should be revised. Stations in small and medium sized markets should not be placed in financial distress before they are allowed to enter into combinations. The requirement that stations must first look for an "out-of-market" buyer should be eliminated.

- Limitations on the transferability of newly created duopoly combinations should be eliminated.

- The Commission should revise its analysis regarding the equivalency of UHF and VHF facilities.

We trust the FCC will accept these proposed changes. These modifications will insure that viewers in all television markets have access to the best free, over-the-air television service.

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# PETITION FOR RECONSIDERATION SUBMITTED BY THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

The Association of Local Television Stations, Inc (hereinafter ALTV) hereby files the following Petition for Reconsideration in the above captioned matter. ALTV is a national trade associate, representing television stations throughout the United States. Our member are primarily affiliates of the emerging networks as well as general audience independent stations.

ALTV has been an active participant throughout this proceeding. We have been one of the leading proponents urging a relaxation of the local television duopoly rule. Throughout this proceeding we have provided the Commission with solid evidence that local market combinations enhance viewpoint and program diversity. We file this petition because several aspects of the *Report and Order* are fatally flawed.[1] In this petition we urge the Commission to:

- Permanently grandfather all existing local marketing agreements. This includes all local marketing agreements entered into prior to the adoption date of this *Report and Order*.
- Eliminate the "eight independent voice standard."
- To the extent the Commission decides to continue applying a voice standard, then all competing media should be counted as a voice. This includes cable television, DBS, MMDS, radio, newspapers, magazines and the Internet.
- The waiver process should be revised. Stations in small and medium sized markets should not be placed in financial distress before they are allowed to enter into combinations. The requirement that stations must first look for an "out-of-market" buyer should be eliminated.
- Limitations on the transferability of newly created duopoly combinations should be eliminated.
- The Commission should revise its analysis regarding the equivalency of UHF and VHF facilities.

We urge the FCC to make these modifications to the *Report and Order*. Without these changes, the Commission's decision could have the unanticipated result of reducing program diversity in markets throughout the United States.

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[1] *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules,* MM Docket No. 91-221, 87-8, FCC99-209, (released August 6, 1999) (hereinafter *Report and Order*). The Commission has issued an errata modifying portions of the Report and Order on August 13, 1999 and September 7, 1999. The Commission also issues a Public Notice, FCC 99-240 (released September 9,1999) soliciting comment on "tie breaker" procedures for applications filed pursuant to the new rules

## I. Diversity: An Overview

The *Report and Order* leaves little doubt that the Commission's primary regulatory objective in this proceeding is the pursuit of a diverse broadcast system. In this regard the FCC pursues two diversity objectives. The first is to promote outlet diversity. Stated alternatively, the FCC seeks to promote a number of diverse, independently owned broadcast outlets. The theory underlying this objective is that independently owned outlets will lead to more diverse program content. The marketplace of ideas will be enhanced because independent owners will bring a different perspective to program content.

As the *Report and Order* concedes, however, the Commission has no hard evidence to demonstrate a nexus between independent ownership and a greater diversity of program content. To the contrary, the Commission acknowledges that such a nexus is an intuitive "belief" that a greater diversity of ownership will automatically yield greater diversity in program content.[2] In recent years, the courts and others have begun to question this nexus.[3]

Assuming *arguendo* that a nexus exists, the *Report and Order* still fails to properly balance the two competing concepts of diversity. The Commission has been presented with overwhelming evidence that program diversity will be enhanced if local television stations are

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[2]Report and Order at ¶ 22. (We think intuitive logic and common sense support our belief...)

[3]*See e.g., Lutheran Church v. FCC*, 141 F.3d, 344, 354 (D.C. Cir.) 1998; Dissenting Statement of Commissioner Harold Furchtgott Roth, *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules,* MM Docket No. 91-221, 87-8, FCC 99-209, (released August 6, 1999).

permitted to combine in local markets.[4] In other words, the Commission's ultimate objective of promoting a greater variety of diverse program product in local markets is not necessarily enhanced by pursuing an industrial structure based on individually owned television stations in local markets.

Despite this evidence, the FCC continues to place higher priority on achieving a diverse ownership structure as opposed to permitting economic combinations that will increase programming diversity. Outlet diversity is merely the means to achieve the desired goal -- diverse program product. As the record in this proceeding demonstrated, pursuing a goal of independent ownership will not necessarily lead to improvements in the diversity of program content. In many markets program diversity can be enhanced only through local market combinations. This improper balancing lead the FCC to impose unnecessarily harsh restrictions on local marketing agreements and newly formed duopoly combinations.

## II. LOCAL MARKETING AGREEMENTS SHOULD BE PERMANENTLY GRANDFATHERED.

Throughout this proceeding, ALTV submitted considerable evidence documenting the important public interest benefits of local marketing agreements.[5] This evidence was based on

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[4]On this point there appears to be no factual dispute. Evidence submitted into the record from existing local marketing agreements demonstrates that local market combinations provide improved service to consumers in local markets.

[5]See e.g., *Local marketing Agreements and the Public Interest: A Supplemental Report filed in MM Docket No 91-221, May 1998* (hereinafter *Supplemental Report); Local marketing Agreements and the Public Interest*, attached to Reply Comments of the Association of Local Television Station in MM Docket No. 91-221 March 21, 1997.; .

responses to the FCC's Public Notice (June 17, 1997) which requested information regarding the public interest benefits of local marketing agreements. The evidence submitted in this proceeding regarding the public interest benefits of local marketing agreements is overwhelming and unchallenged. From a factual standpoint the FCC can agree with prior Congressional findings that local marketing agreements have served the public interest. Indeed, the *Report and Order* acknowledges the factual basis for this public interest finding.[6] Unfortunately, the *Report and Order* did not grandfather existing LMA combinations. The FCC's temporary reprieve is inconsistent with the 1996 Telecommunications Act.

**A. The 1996 Telecommunications Act Requires Permanent Grandfathering**

The Commission's decision not to permanently grandfather local marketing agreements is flatly inconsistent with Section 202(g) of the 1996 Telecommunication Act. Section 202(g) states:

> [N]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with regulations of the Commission.[7]

There is no question that the statute intended to permanently grandfather LMAs. As the Conference Committee stated:

> Subsection (g) grandfathers LMAs currently in existence upon enactment of this legislation and allows LMAs in the future, consistent with the Commissions rules. The conferees note the positive contribution of television LMAs and this subsection assures that this legislation does not deprive the public of the benefits

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[6]*Report and Order* at para. 36 n.68

[7]47 U.S.C. Section 202(g)

> of existing LMAs that were otherwise in compliance with Commission regulations on the date of enactment.[8]

Similarly, the report of the House Commerce Committee stated:

> Nothing in subsection [g] is to be construed to prohibit the continuation or renewal of any television local marketing agreement in effect on the date of enactment. The Committee wishes to note the positive contributions of television local marketing agreements and to assure that this legislation does not deprive the public of the benefits of existing local marketing agreements that were otherwise in compliance with Commission regulations on the date of enactment of this legislation. The efficiencies gained through these agreements have reaped substantial rewards for both competition and diversity, enabling stations to go on the air which would not otherwise be able to obtain financing, and saving failing stations which would otherwise go dark.[9]

Floor statements in both the House and Senate also confirm the Congressional intent to grandfather these combinations. For example, Senator Ford stated:

> In addition to the duopoly rule, I am also pleased to see that this conference report grandfathers local marketing agreements, or LMA's. Many local broadcasters have stayed competitive by entering into these LMA's with one another. These innovative joint ventures allow separately owned stations to function cooperatively, achieving economies of scale through combined sales and advertising efforts, and shared technical facilities. These local marketing agreements have served their communities in a number of ways: some have increased coverage of local news; others have increased coverage of local sports, particularly college sports; and, many LMA's have provided outlets for innovative local programming and children's programming.[10]

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[8]Conference Report 104-230, 104th Cong 2d Sess. 164.(1996) (hereinafter cited as Conference Report)

[9]H. Rep 104-204, 100th Cong. 1st Sess. (1995) at 119-120

[10]142 CONG. REC. S687, S705 (Daily ed. Feb 1, 1996)

Representative Upton echoed similar concerns in the House:

> There are many important issues in the bill before us today. Let me take a moment to take note of an issue of particular concern to the people of southwest Michigan -- local marketing agreements, also known as LMA's....
>
> I'm fully in support of efforts to allow for the continuation of LMA's in the future and I'm pleased that these provisions are part of S.652.[11]

Indeed, a colloquy between Representative Stearns of Florida and then House Telecommunications Subcommittee Chairman Jack Fields summed up congressional intent:

> Such agreements enable separately owned stations to function cooperatively, achieving significant economies of scale via combined sales and advertising efforts, shared technical facilities and increasing station access to diverse programming. I'm pleased this legislation recognizes the benefits of LMA's and grandfathers them. By grandfathering LMA's, we are allowing broadcasters to continue to use a tool that has helped them meet the challenges of today and tomorrow.[12]

Further clarification of the legislation's intent was provided in the 1997 Budget Reconciliation Act. The Budget Act waived the duopoly rule to permit stations to bid on returned analog spectrum in their own local markets. In explaining this provision, Congress made it clear the Commission had an obligation to move forward with a more timely relaxation of the duopoly rule. Its expectations of the FCC were quite clear:

> [The conferees]...expect that the Commission will provide additional relief (e.g., VHF/UHF combinations) that it finds to be in the public interest, and will implement the *permanent grandfathering* requirement for local marketing agreements as provided in the Telecommunications Act of 1996.[13] *(emphasis supplied)*

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[11] 142 CONG. REC. H1145, H1177 (daily ed. Feb 1, 1996)

[12] 142 CONG. REC. H1145, H1165 (daily ed. Feb. 1, 1996)

[13] H. Conf. Rep., 105th Cong. 1st Sess., 143 CONG. REC. At H 6175 (1997)

Despite the unequivocal language in two statutes, the *Report and Order* refused to grandfather local marketing agreements. According to the Commission, the language does not necessarily require the FCC to extend permanent grandfathering to television LMAs. In this regard, the FCC believes the statutory language left to the "Commission to decide whether and how to regulate them, including as appropriate prohibiting them, phasing them out, grandfathering them or permitting them."[14]

The Commission's position is premised on the notion that Section 202(g) of the 1996 Telecommunications Act gives the FCC the discretion to prohibit or continue LMAs that are in *compliance with the regulations* of the Commission. Under this construction, the FCC has the authority to limit the rights of stations involved in local marketing agreements by making them comply with regulations that did not exist in 1996. In essence, the FCC reads the statute as authorizing the *post hoc* application of a new set of rules limiting the rights of stations involved in LMA agreements. The statute cannot be read in such a manner.

A better reading of the statute is that all LMAs in compliance with the FCC rules, as they existed in prior to the date of the *Report and Order*, were grandfathered by the 1996 Telecommunications Act. As noted above, this construction finds ample support in the legislative record. It must be remembered that prior to the *Report and Order*, these arrangements were perfectly legal (*i.e.,* not attributable interests) under the FCC rules. They were in compliance with the FCC's ownership policies existing at that time. Accordingly, for these

[14]*Report and Order* at ¶ 136.

LMAs the FCC could adopt no rule that would prohibit the origination, continuation or renewal of these local marketing agreements.

The Commission's treatment of LMAs in the *Report and Order* conflicts with this Congressional directive. The FCC has enacted rules that limit the continuation and renewal of these local marketing agreements. While the *Report and Order* contemplates a further review of the subject in 2004, it is possible that LMAs may not be permitted beyond this date. Indeed, in order to continue, these LMAs must meet the future biennial review criteria.[15] During the interim, renewal may not extend beyond the date for the 2004 biennial review. Moreover, even if existing local marketing agreements meet these criteria, it is not clear what a station receives. For example, the FCC is not clear whether LMAs meeting the criteria will receive a permanent grandfather, another temporary reprieve or duopoly status. Such a result is in direct conflict with the statute's provisions.

**B. Failing to Grandfather The Post 1996 LMAs is Arbitrary.**

According to the *Report and Order*, LMAs entered into prior to November 5, 1996 will be given until the conclusion of the Commission's 2004 biennial review before being confronted with possible divestiture.[16] LMAs entered into after November 5, 1996 will be given two years to terminate the relationship. There is no justification for such unequal treatment.[17]

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[15]*Report and Order* at ¶ 133.

[16]*Report and Order* at ¶ 143.

[17]At the time of the FCC's decision there were approximately 11 post-96 LMAs.

The equities involved compel equal treatment for both the pre- and post- 96 LMAs. The *Report and Order* justifies the five year reprieve granted to the pre-1996 LMAs on the following grounds:

> The parties to these LMAs entered into these arrangements when here was no Commission rule or policy prohibiting them. There consequently are strong equities against requiring them to divest their interests in these LMAs and upset settled expectations established by these plans and investments. Doing so could impose an unfair hardship on these parties.
>
> In addition to these equities, the record shows that a number of the television LMAs resulted in public interest benefits. ALTV submitted a study showing that LMAs helped some struggling station complete construction of their facilities or upgrade them, allowed others to add a local newscast or other local programming to their schedule, and more generally permitted stations to take advantage of operating efficiencies to serve their viewers better. We do not wish to disrupt these public interest benefits.[18]

These justifications apply with equal force to the post-1996 LMAs. Indeed, the justifications proffered by the FCC for the five year grandfathering provide no meaningful way to distinguish between pre- and post-1996 LMAs.

First, LMAs remained perfectly legal during the November, 1996, to August, 1999, time period. Like their pre-1996 brethren, there was no rule or policy prohibiting the creation of these LMAs during the post-1996 period.

Second, there is ample evidence in the record to demonstrate that the post-96 LMAs also invested heavily in their brokered stations. These stations had settled expectations. In some instances these LMAs have been in existence for several years. Requiring divestiture in two year will create an unfair hardship.

[18]Report and Order at ¶ 144-145.

Third, the post-96 LMAs also provided significant public interest benefits. They helped upgrade the brokered station's facilities, improved programming performance and generally improved service to the public. In terms of public interest performance, no meaningful distinction can be drawn between the pre- and post - 1996 LMAs. The facts in this case cry out for equal treatment.

The Commission does seek to justify such unequal treatment on the grounds that parties were notified in the *Second Further Notice* that future LMAs would be attributable.

> We will adopt our proposal in the *Second Further Notice* to grandfather television LMAs entered into before the adoption date of that *Notice, i.e.* November 5, 1996. It was on this date that the Commission gave clear notice that it intended to attribute television LMAs *in certain circumstances*, and that LMAs entered into on or after that date *that violated our local television ownership rule* would not be grandfathered and would be accorded only a fixed period in which to terminate.[19] *(emphasis supplied)*

The *Report and Order's* attempt to justify disparate treatment on a theory of prior notification is unpersuasive.

First, statements contained in the *Second Further Notice* do not constitute FCC rules and policies. As with any *Notice of Proposed Rule Making*, proposals are suggested in order to solicit comment. Indeed, there were several proposals regarding the treatment of LMAs and local market combinations that were never enacted. To hold that the proposals in the *Second Further Notice* have the effect of law is incompatible with basic administrative law.

Second, the precise language in the *Second Further Notice* does not provide unequivocal notice. It states:

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[19] *Report and Order* at ¶ 139.

> Consequently if these latter television LMAs result in violation of any Commission ownership rule, they would not be grandfathered and would be accorded only a brief period in which to terminate.[20]

The language proposes to terminate only those LMA's that would run afoul of any new ownership rule that was adopted. However, in 1996 no licensee was sufficiently prescient to know what form the new duopoly and attribution rules would take. It was not until the *Report and Order* was issued in August that a party would discover whether its combination violated the new duopoly or attribution rules.[21]

Third, it is simply unreasonable to expect the marketplace to remain "frozen" for three years while the FCC tries to decide the issue. This is not a situation where the Commission provided notice and then proceeded to act within a couple of months or even a year. It is simply unreasonable to prevent stations from responding to their competitive environment, and refrain from adopting a specific business structure, because that corporate structure may or may not be prohibited by some future FCC decision.

Finally it is important to remember that LMAs entered into after November 5, 1996, were perfectly legal under then existing FCC policy. During this period the FCC renewed the licenses and approved transfers involving LMA facilities.

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[20]*Second Further Notice of Proposed Rule Making* in MM Docket No. 91-221, MM Docket No. 87-8, 11 FCC Rcd 21655, 21694 (November 7, 1996)

[21]Further support for this proposition can be seen in the number of post-96 LMAs need not be terminated because of the changes made to the duopoly rule in the *Report and Order*.

### C. The FCC Should Adopt a Flexible Definition as to What Constitutes A "Qualified LMA".

Assuming the Commission continues to make a distinction between pre- and post- 1996 LMAs, ALTV believes it should apply this definition in a flexible manner. Not all situations are the same, and there may be instances where the relationships between stations prior to 1996 effectively make the stations a *defacto* pre-1996 LMA.

For example, there are some situations where the stations involved in a post-96 LMA operated as terrestrial satellite stations prior to 1996. Thus while the LMA agreement may have been executed after the November 5, 1996, date, the stations had a working relationship prior to 1996. Moving from a satellite operation to an LMA actually increases the diversity of programming in the market. In effect you are shifting from a station that substantially duplicated the programming of the primary station to a situation where both stations are providing distinct programming. Another situation arises where a station is involved in an LMA prior to 1996, changes LMA partners, and enters into a new LMA after November 5, 1996. A final scenario involves post-96 local marketing agreements and newly built facilities.

In all these cases, the level of diversity in the pre- and post-1996 time period does not change. In both the satellite situation and where there has been a change in partners, the same number of voices exited in the market. In the unbuilt station situation, there was no voice at all. Thus a post-96 LMA that led to the construction of a new facility did not decrease the number of independent voices in the market.

Moreover, the policy justifications which underlie the pre-1996 LMAs are equally applicable to these situations. Significant investment has been made through a long established relationship. The community has enjoyed the benefits of improved program service. Significant disruption in service would ensue if premature divestiture were required.

## II. The "Eight Independent Voice" Standard Should be Eliminated

Pursuant to the FCC's new rules, an entity is able to own two television stations in the same market provided 1) there are eight independent voices in the market, and 2) the top four stations in the market (as measured by ratings) do not combine with each other. The "eight independent voice" standard is the cornerstone of the Commission's new rule. Broadcasters seeking to acquire local market television combinations in markets that fall below this "eight voice" threshold must secure a waiver of the rules. The Commission's standard is arbitrary and inconsistent with the public interest.

### A. No Justification is Provided for Selecting an "Eight" Voice Standard

The *Report and Order* provides little or no analysis for selecting "eight" voices as the baseline standard for the new duopoly rule. As the Commission observed, "Our decision today is an exercise in line drawing -- perennially one of the most difficult inevitable challenges facing a government agency."[22] While no one disputes that balancing competing interests is difficult for any agency, administrative line drawing must be predicated on some rational basis.

Little or no analysis is provided for selecting eight as the "magic" number of independent voices in the market. The Commission could have selected five, six or seven voices as the

[22] *Report and Order* at ¶ 21

diversity baseline. The only justification for selecting "eight" is a generalized statement that it was balancing competing interests.

> Taking into account current marketplace conditions, the eight voice standard we adopt today strikes what we believe to be an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity.[23]

The *Report and Order* makes no attempt to find a nexus between its need to balance conflicting policies and the specific selection of "eight voices" as the baseline for competition and diversity in a local market. In this regard, the number "eight" appears to have been pulled out of thin air.

The selection of "eight" independent voices for the television duopoly rule is inconsistent with other FCC rules. In the context of radio and television cross ownership, the *Report and Order* believes that twenty voices are an appropriate baseline in larger markets, whereas ten voices are more appropriate in other markets.[24] According to the existing broadcast/newspaper cross-ownership rule[25] and broadcast/cable cross-ownership rule[26], there apparently is no voice count "baseline" because these combinations are prohibited in all markets.

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[23] *Report and Order* at ¶ 67.

[24] *Report and Order* at ¶ 9.

[25] 47 C.F.R. Section 73.3555(c)

[26] 47 C.F.R. Section 76.501

## B. The Decision to Count Only Television Broadcast Stations as Competitive Voices Lacks Support in the Record.

Pursuant to the rule, the FCC will count only independently owned commercial and non-commercial stations. Other media, such as cable systems, radio stations, newspapers, magazines, billboards, direct broadcast satellite systems and the Internet are simply not counted as a voice under the rule. The approach not only defies logic, but it is inconsistent with past Commission decisions, existing rules and other parts of the *Report and Order.*

### 1. Competing media are diversity substitutes.

The Commission's decision to count only free, over-the-air television stations as voices in the market is predicated on two assumptions. First, broadcast television continues to have a "special and pervasive impact in our society given its role as the preeminent source of news and entertainment for most Americans."[27] Second, according to the FCC, "[W]e are unable to reach a definitive conclusion at this time as to the extent to which other media serve as readily available substitutes for broadcast television."[28] Both justifications are unpersuasive.

The FCC's first justification is nothing more than a statement that we must regulate broadcast ownership because it is an important medium. As an information source, however, there are many important sources of information available in the market. Broadcast television is not even the most pervasive form of media distribution in the country. Indeed, over 65 million television households receive their local broadcast signal through cable. More than seven million

[27] *Id.* at ¶ 68.

[28] *Id.* at ¶ 69.

consumers subscribe to direct broadcast satellite services. Some of these services are already receiving a local to local satellite service. The point is that while local broadcast stations remain important, most consumers are receiving these signals through another multi-channel medium. This means that the vast majority of Americans can shift from broadcast television to other cable or satellite channels at the flick of a button.

It is not enough to say that over-the-air television remains as an important source of news and information. From a diversity and competitive standpoint, the more relevant question is whether there are competing sources of information.

From a diversity standpoint, there is simply no question that the vast majority of the American people receive their information from a number of information outlets and programs. To illustrate the point, Bear Stearns recently reported the cumulative ratings between broadcast television and cable systems. The results are most revealing.

**Comparative Prime Time Ratings**
**for Broadcast Networks, Pay Cable and Basic Cable Networks**

| | **Nov. 1982 Ratings/Share** | **Nov. 1990 Ratings/Share** | **Nov. 1997 Ratings/Share** |
|---|---|---|---|
| **Network Affiliates** | 49.6/80 | 38.1/61.9 | 30.1/45 |
| **Independents** | 8.7/14 | 13.0/22 | 7.4/12 |
| **PBS** | 2.4/4.0 | 2.3/4.0 | 2.5/4.0 |
| **Pay Cable** | 3.1/5.0 | 3.1/5.0 | 3.5/6.0 |
| **Cable Networks** | 1.8/3.0 | 11.2/16.0 | 21.2/34.0 |

*Source: Bear Stearns, Cable & Broadcast March 1999 at 102.*

A careful examination of the data reveals that basic cable networks now have a combined audience rating and share close to the combined ratings and share of the big four broadcast television networks. There is no doubt that the audience share of the basic cable networks exceeds that of any individual big four broadcast network. Indeed, the ratings and share of the cable network audience exceeds the combined Independent and PBS share. The data demonstrate that as a source of video information, consumers believe that cable is a substitute for broadcast television.

Every day across America tens of millions of people are turning to a plethora of cable news channels such as CNN, MSNBC, FoxNews, CNN, CNBC and HeadlineNews. This does not even include other cable channels such as MTV, USA, BET and the Family Channel which telecast news programs directly related to their target audiences. Similarly, consumers do not get information from newspapers, magazines and the Internet. Indeed, as reported by *Electronic Media,* a new study by Frank Magid points to the increasing substitutability between the Internet and broadcast television as an information source:

> The survey, from Frank N. Magid & Associates, warns particulary about attitude changes among viewers who are regular Internet users..."Those who are using the Internet regularly are naming local TV news less often as their primary source of news," said Maryann Schultze, director of Magid Media Futures.[29]

There is absolutely no persuasive evidence in the record to challenge the fact that consumers select their information from a variety of sources. For example, the substitutability among the various electronic media are quantified on a daily basis through the Nielsen ratings.

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[29] *Electronic Media*, September 27, 1999 at 1, 44.

On the other hand, what evidence does the FCC have that the various media are not information substitutes for the purposes of diversity? The *Report and Order* devotes a single sentence to this issue.

> Nor is there a consensus on the extent to which various media are substitutes for purposes of diversity.[30]

This statement is a gross misreading of the record. The overwhelming majority of commenters in this proceeding found that broadcast television stations are in the same information market as cable systems, DBS, MMDS, newspapers, magazines and the Internet.

None of the concerns raised by the FCC focus on alternative media as a source of "diverse" information. Rather the studies examined these alternate media sources as a substitute for advertising. In this regard the Commission performs an analytic "slight of hand." It bases its rule primarily on diversity concerns, claiming alternative media are insufficient substitutes as sources of diverse information. However, the FCC's decision regarding the lack of substitutability between broadcast television and other media, is based solely on evidence that relates to "economic substitutes."[31]

**2. The FCC misreads the economic evidence: Cable and other information sources compete with local broadcast television stations.**

The *Report and Order* simply ignores the significance of the studies that have been presented. As the *Report and Order* acknowledged, the most extensive study in the record was provided by the National Economic Research Associates, Inc. (NERA). The NERA study found

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[30]*Report and Order* at ¶ 69.

[31]*Report and Order* at ¶ 30 to 33.

that the relevant product market for local advertising clearly includes radio, cable, print media and likely includes other media as well. As reported in the LSOC's comments, NERA concluded:

> [T]here is sufficient information from a variety of sources upon which to conclude that the product dimension of relevant markets for local advertising messages may well encompass all media, including both electronic media, *e.g.*, radio, broadcast, and cable television, and nonelectronic media, *e.g.,* direct mail, newspapers magazines, yellow pages and billboards.[32]

The conclusion of the study rested on the following facts:

- Sellers of print and electronic media advertising consider themselves in competition with each other, as evidenced by their efforts to sell against each other in the local market -- and their respective trade associations' efforts to help them promote themselves against competing media.[33]

- Buyers of advertising also use a variety of media and are or would be responsive to relative price changes.[34]

- Academic literature has recognized that various advertising media compete for advertising dollars.[35]

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[32]LSOC Comments in MM Docket No. 99-221, February 7, 1997 citing, Addanki, Buetel, and Kitt, *Regulating Television Stations Acquisitions: An Assessment of the Duopoly Rule*, National Economic Research Associates (May 17, 1995) at 2, *submitted as Exhibit 1 to the LSOC comments*; *see also*, Kitt and Beutel, *An Economic Analysis of the Relevant Advertising Markets Within Which to Assess the Likely Competitive Effects of the Proposed Time Brokerage Arrangement Between WUAB Channel 43 and WOIO Channel 19*, National Economic Research Associates (July 15, 1994) at 2, *submitted as Exhibit 5* to the Comments of Malrite Communications Group., Inc, MM Docket No. 91-221 (filed May 17, 1995) (herein after Malrite NERA).

[33]NERA at 11-2, Malrite NERA at 7-8.

[34]Malrite (NERA) at 8-11.

[35]NERA at 12-13, Malrite NERA at 11-14.

- While expenditures on broadcast television have increased, television has become less expensive relative to newspapers, thus indication that lowering advertising rates may affect advertisers' selection of media -- and that various media are substitutes for each other.[36]

The *Report and Order* does not dispute the conclusions of this study.[37] The only complaint appears to be that the study did not provide statistical estimates of cross-elasticities of demand as the FCC purportedly demanded. This is because the market is formed from bilateral oral negotiations between advertising buyers and sellers.[38] To the extent such negotiations are oral, it is entirely possible that the Commission's call for statistical cross-elasticity studies imposes an impossible evidentiary burden. The Commission offers no reason why statistical cross-elasticity studies are the *only* means to demonstrate economic substitutability among the various media. In any event, it most certainly does not mean that these alternative media are not complete and full substitutes for television broadcasting.[39] .

Another key economic study was submitted by Economists Inc., which concluded:

> The empirical evidence...indicates that other forms of advertising, such as yellow pages, outdoor, and direct mail, are substitutes for video, radio and newspaper advertising.[40]

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[36]NERA at 15.

[37]*Report and Order* at ¶ 31.

[38]*Id.*

[39]Indeed, the Department of Justice, which is primarily responsible for ensuring competition in television markets, relied on NERAs competitive analysis when it approved the local marketing agreement between WUAB and WOIO. If the analysis is good enough for the Department of Justice, it should be good enough for the Commission.

[40]*An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules*, Economists Incorporated (May 17, 1995) at 23. (Hereinafter cited as the "E.I. Study").

The study observed further:

> At both the national and local levels, advertisers generally use an array of media...Advertisers that use broadcast television typically make use of other media as well. Also over time there has been substantial shifts in advertising among media, for example, from print to television, and within television from network to syndicated and cable, in response to changes in the relative prices and efficacy of these media.[41]
>
> [T]here is no evidence to support a conclusion that other forms of advertising--including yellow pages, outdoor and direct mail--do not constrain the prices of video, radio and newspaper advertising. In sum, advertising markets are likely to be broader than those tentatively identified by the Commission.[42]

Again the FCC's only objection to this study appears to be that it failed to provide specific econometric evidence of the cross-elasticity among alternative media.[43] Nowhere does the FCC dispute the conclusions of the analysis or state that the findings were erroneous. Again, the only criticism is that the study did not perform the type of statistical analysis preferred by the FCC. However, as the *Report and Order* acknowledges, the data submitted in the study are more than sufficient for analyzing competition in the antitrust context.

The FCC's criticism of these studies is perplexing given the fact that there are no counter studies demonstrating that broadcast television and other media are not economic substitutes.[44] There is no evidence to demonstrate that television broadcasting does not compete with cable,

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[41]*Id. at* 19.

[42]*Id at* 24.

[43]*Report and Order at* ¶ 32.

[44]In this regard the FCC cites to only one generalized article concerning radio advertising. competition in the radio markets. Even the FCC characterizes this study's conclusion as tentative. Report and Order at ¶ 33, n.61.

DBS, MMDS, newspapers, magazines, billboards and the Internet. To the contrary, almost every television broadcaster commenting in this proceeding stated that they do compete with these alternative media

### C. Not Counting Other Media as a Voice is Inconsistent With Existing FCC Rules and Decisions.

The decision not to count alternative media as a voice when applying the eight voice duopoly standard conflicts directly with other FCC rules and policies. The contradiction is glaring. In 1984, the Commission concluded that all these media are substitutes:

> The record in this proceeding supports the conclusion that the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media, and numerous print media as well. In the Notice we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is, cable, newspapers, magazines and periodicals are substitutes in the provision of such information.[45]

Even though competition has increased exponentially since 1984, the Commission now believes these media are not sufficient information substitutes.

The most obvious contradiction can be found in the *Report and Order.* Paragraph 69 concludes that other media are not substitutes for local broadcast television, and therefore should not be counted as a voice under the independent voice test.

> Thus while we agree with those commenters who argued that different types of media, such as radio, cable television, VCR, MMDS and newspapers may to some extent be substitutes for broadcast television, in the absence of factual data we

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[45]*In the Matter of Amendment of Section 73.3555, Report and Order* in Gen Docket No. 83-1009, 100 FCC 2d 17, 25 (1984).

> requested, we have decided to exercise due caution by employing a minimum station count that includes only broadcast television stations.[46]

In short, the FCC finds that radio and television are insufficient competitors to be counted in the same product market for both diversity and competition. Less then twenty pages later, however, broadcast television is a sufficient competitor to radio to justify the continuation of the radio/television one-to-a-market rule.

> We stated in the *TV Ownership Further Notice* that elimination of the rule might be warranted if we concluded that radio and television stations do not compete in the same local advertising, program delivery, or diversity markets. Although radio and television may or may not compete in different advertising markets, we believe a radio-television cross-ownership rule continues to be necessary to promote diversity of viewpoints in the broadcast media. The public continues to rely on both radio and television for news and information, suggesting the two media both contribute to the "marketplace of ideas" and compete in the same diversity market. As these two media do serve as substitutes at least to some degree for diversity purposes, we will retain a relaxed one-to-a-market rule to ensure that viewpoint diversity is adequately protected.[47]

The two statements cannot be reconciled. The FCC cannot state that radio is not a competitor to television, hence not counted as a voice under the new duopoly rule, and at the same time, consider the mediums competitive, hence counting television as a voice under the new, revised one-to-a-market rule. If television is sufficiently competitive to radio to justify continuation of the one-to-a-market rule, and to be counted as a voice under that rule, then radio should be counted as a voice under the television duopoly rule.

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[46] *Report and Order* at ¶ 69.

[47] *Report and Order* at ¶ 104.

The inconsistency does not end with the treatment of radio and television competition. In addition to television competing with radio, other alternative media should also be considered competitors in the market.

> We will also include in our voice count daily newspapers and cable systems because we believe that such media are an important source of news and information on issues of local concern and compete with radio and television, at least to some extent, as advertising outlets.[48]

If the above analysis is correct, then there is no reason not to count newspapers and cable systems as a voice under the new revised duopoly rule. It is inconsistent to consider cable and newspapers as important sources of news and information on issues of local concern for radio listeners and not for broadcast television viewers.[49] It is impossible to reconcile this paragraph with the FCC's decision not to count these sources as competitors under the duopoly rule.

Finally, the FCC's decision not to count competing media as a voice in its duopoly rule is inconsistent with other FCC cross-ownership rules. For example, the Commission's newspaper/broadcast cross-ownership rule and its cable/broadcast cross-ownership rule are both premised on the fact that these media exist in the same diversity and economic markets. In other words, they are sufficiently substitutable to justify continuation of the rules. It is irrational for

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[48] *Id.* at ¶ 113.

[49] This analysis undercuts one of the Commissions objections to counting subscription video services as a competitor to free television. According to this position cable systems, DBS and other pay media do not compete with local television stations because they are a pay as opposed to a free service. If true, then this analysis should apply to radio competition, which is also a free service. To the extent the FCC does not believe the "pay vs. free" distinction applies in the radio context, then it should be used as a justification for excluding multichannel pay services as competitors to free over-the-air television.

the FCC to hold that these media are sufficiently substitutable to justify a rule against common ownership and at the same time not count them as substitutes under the new duopoly rule.

### D. Cable and Other Multichannel Media Should be Counted as Multiple Voices

The *Report and Order* also erred in how it counts multichannel voices.[50] Under the revised one-to-a-market rule cable is counted only as one voice. The *Report and Order* acknowledges, however, that cable systems offer multiple channels which contribute to diversity in local markets.

> We will also include wired cable television in the DMA as one voice, since cable service is generally available to households throughout the U.S. We believe it is appropriate to include at least one voice for cable, where cable passes most of the homes in the market, because there are PEG and other channels on cable systems that present local informational and public affairs programming to the public.[51]

The FCC however only counts cable as one voice because: 1) cable subscribers have only one cable system to choose from, and 2) despite a multiplicity of channels, most cable programming available to a household is controlled by a single entity -- the cable operator.[52] The analysis is premised on the notion that as a single gatekeeper, cable operators exercise editorial control over content appearing on the system.

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[50]We recognize that the Report and Order does not count multichannel providers at all under the "eight independent voice standard." Nonetheless, to the extent the Commission decies to count these systems as voices on reconsideration, then each channel should be considered as a voice.

[51]*Report and Order* at ¶ 113.

[52]*Id.*

Each cable network or cable channel makes its own decision regarding the content that will appear on its channel. For example, CNN exercises editorial control over what appears on its news. The same is true for CNBC, Fox News and MSNBC. Cable operators by law have limited control over what appears on their PEG channels.

While the cable operator (more likely the MSO's corporate headquarters) decides which cable networks are carried, there is little or no control over the content of these channels. Unlike local broadcasters, local cable operators exercise no editorial control over specific programs appearing on the cable channel and do not preempt programs on these channels.

Once a cable channel is placed on the system, the very nature of the business dictates that a cable operator will act as a passive conduit for multiple channels, hence multiple voices in a market. From the subscriber's perspective, each cable channel is a possible substitute for a local television station. Because news and information can be obtained from scores of cable channels in each market, it makes little sense to treat cable as a single voice.

The Commission's treatment of DBS and wireless cable is similarly flawed. The Commission states that these systems should not count because they do not provide local news and public affairs programming.[53] First, the Commission is incorrect in asserting that DBS systems are not distributing local news through the carriage of local television stations. At the present time Echostar is providing a local-to-local television service in the top 20 markets. DirecTV is planning to offer a similar service in the near future. There is no question that DBS systems provide multiple channels providing news and information.

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[53]*Report and Order* at ¶ 114.

The Commission is also incorrect when it dismisses DBS programs because they "allegedly" do not address local issues. To reach this conclusion, the Commission must somehow draw a distinction between local issues and other non-local issues. Do programs on youth violence, drugs, or gangs have any less importance to a local community because they appear on a nationally distributed satellite service? These are both local and national problems. The national debt and budget surpluses directly impact local services from road repairs to welfare distributions. It is simply impossible to draw such distinctions.[54]

### E. The Eight Independent Voice Standard Harms Diversity in Small and Medium Sized Markets

Throughout the long history of this proceeding, the Commission has focused on two aspects of diversity. The first is outlet diversity, which concerns the number of independently owned outlets in a market. An equally important consideration is program diversity, which concerns the diversity of programming that is available to consumers in a local market. In the end, it is the availability of programming that should ultimately control the Commission's decision. The pursuit of independent ownership is meaningless if these independently owned stations cannot sustain themselves economically. As was noted in this proceeding previously:

> The FCC's duopoly rule presumes that an industry comprised of separate owners promotes diversity by creating independent "antagonistic" owners in local markets. It assumes that an independent "antagonistic" ownership structure will ultimately create a diverse marketplace of ideas with respect to programming and editorial opinion broadcast over the airwaves. It is worth remembering, however,

[54]Similarly, one cannot assume that the marketplace of ideas is limited to news and information channels. Ideas that contribute to a diversity of voices can appear equally through entertainment and other programs.

> that the nexus between separate ownership in local markets and an increase in programming a viewpoint diversity is a *presumption*, not a hard fact.[55]
>
> At the core of the FCC's ownership policies is the goal that diverse ownership will lead to the broadcasting of diverse programming and opinions. It is the programming that conveys the thoughts and opinions so necessary to enhance the marketplace of ideas. But the marketplace of ideas is not enhanced, if in the name of a diverse ownership structure, a station lacks the economic vitality to present local news, public affairs and other programs. Continuing to impose an economically unsound industrial structure in local markets in the name of "ownership diversity" is simply counterproductive. In the long run, even the number of diverse owners will decline as firms leave the market and stations go off the air.[56]

By focusing on a "voice count," the Commission's decision favors "outlet" diversity at the expense of programming diversity. It has supplanted the ultimate goal, providing diverse programming with the means traditionally used to achieve that goal.

Nowhere is this more apparent than in those markets with less than eight television voices. As was observed during the comment phase of this proceeding, the economics of small and medium sized markets make it extremely difficult for a full complement of independently owned television stations to survive. Indeed, the overwhelming majority of television local marketing agreements were located in small markets precisely because of the economic

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[55] *Local Marketing Agreements and the Public Interest: A Supplemental Report*, Association of Local Television Stations and Local Station Ownership Coalition, filed in MM Docket No. 91-221, May 1998 at 3. (hereinafter "LMA Supplemental Report")

[56] *Id.* at 5.

conditions found in these markets.[57] The smaller populations in these markets made it difficult to support additional independently owned television stations.

While the *Report and Order* recognizes that smaller markets can benefit from the efficiencies of local combinations, it nonetheless concludes that consolidation in these markets could most undermine competition and diversity goals because there are fewer stations in these markets.[58] Nowhere does the *Report and Order* even address the compelling evidence that local market combinations are essential to providing a greater diversity of programming to consumers. Indeed, consolidation in these markets may be more important than in larger markets. The Commission has simply sacrificed programming diversity in order to promote outlet diversity. It has ignored the ultimate goal -- providing diverse programs to the American public.

## IV. FCC Waiver Policy Is Contrary to the Public Interest

The Commission believes that its waiver policies will provide appropriate relief for small and medium sized markets. Unfortunately, the current waiver process brings stations in small and medium sized markets to the brink of economic disaster before providing any relief.

### A. The Waiver Criteria Create Perverse Economic Incentives

In order to combine, the station must either be a failed, failing or an unbuilt facility. Requiring a station to be in economic distress before permitting it to combine with another

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[57]According to the FCC's LMA surveys, 83% of the LMAs existed outside the top 25 markets and 54% of the LMAs existed outside the top 50 markets. *LMA Supplemental Report* at 7. S*ee also*, Comments of Pegasus Communications Corporation.

[58]*Report and Order* at ¶ 70.

station in the market harms the viewing public. The Commission is telling viewers in these markets that they must endure declines in service quality for lengthy periods of time in the hope that an entity with no television holdings in that market will acquire the station.

Under the FCC's "failed station test" consumers must actually lose a voice in the market (dark for four months) or wait until the station is in involuntary bankruptcy before another station in the market can acquire the facility. [59] Under the failing station standard a station must have a negative cash flow for *three years*.[60] Even with these financial conditions the Commission requires a showing that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the stations. Moreover, the seller must demonstrate that selling the station to an out-of-market buyer would result in an artificially depressed price.[61]

There is no question that, in the name of outlet diversity, the Commission has sacrificed service to the public in these communities. In effect, the FCC would prefer to see a station go dark or bankrupt, than be commonly owned by another station in the market. Such an irrational policy will lead to declines in the diverse programming offerings in these markets.[62]

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[59] *Report and Order* at ¶ 75.

[60] *Id.* at ¶ 36.

[61] *Id.* at ¶ 81.

[62] One particular irony is that after requiring three years of negative cash flow under the failing station standard, the purchasing station must present a factual showing of the programming related benefits that will be derived from the combination. *Id.* at ¶ 81. In other words the FCC forces a local station to endure economic hardship with the associated declines in programming for three years, then requires the buyer to promise to improve programming once the station is acquired. One would think that the public would be better served by permitting the combination to take place before cash flow dries up and service declines.

We see no reason why consumers in small and medium sized markets should be forced to endure declines in program quality. The "eight independent voice" standard should be eliminated. Combinations in small and medium sized markets should be subject to the same standards as stations in large markets.[63] Indeed, as was noted in the initial round of comments, the economics of small markets provides a more compelling case of local market combinations than large markets.

**B. The Waiver Standards Are Inconsistent with Section 310(d)**

Under the failed, failing and unbuilt station waiver standards, a party seeking to sell its facility to an "in-market" broadcaster must demonstrate that no other out-of-market buyers were available. Waivers will be permitted where:

> [T]he in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station; selling the station to an out-of-market buyer would result in an artificially depressed price. As with the showing required of failed station waiver applicants, one way to satisfy this fourth criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received.[64]

The *Report and Order* also indicates that parties may file a petition to deny to rebut such a waiver request.[65] The waiver standard forces the Commission to evaluate whether there are other

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[63]In markets with four or fewer television stations, the Commission may have to revise its prohibition regarding mergers between the top four rated stations. The criteria would appear to be irrelevant in such small markets.

[64]*Report and Order* at ¶ 81.

[65]*Id.* at ¶ 76.

interested out-of-market buyers. Such an examination is in direct conflict with the Communications Act.

Prior to 1952, the FCC began developing policies to compare buyers in the context of transfers.[66] However, comparing potential buyers was expressly prohibited in the 1952 Amendments to the Communications Act.[67] The House Report explains the amendment.

> It is provided that the Commission, in acting upon an application for approval of a transfer or assignment, "may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." In other words, in applying the test of the public interest, convenience and necessity the Commission must do so as though the proposed transferee or assignee were applying for the construction permit or station licencee and as though no other person were interested in securing such a permit or license.[68]

The importance of this amendment cannot be overstated:

> The last clause of the 1952 Amendments is often referred to as the "Avco" Amendment. It takes its name from a case involving The Aviation Corporation ("Avco"), in which the Commission stated that it intended to compare buyers proposed in applications with other interested buyers. In fact, the Commission adopted rules to govern such cases, but soon abandoned them. Congress insured that the Commission would not revert to its former practice by adding the "Avco" amendment to Section 310(b).[69]

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[66]*See, eg.,* Assignment and Transfer of Control, 11 Fed. Reg. 9375 (1946); *Powell Crosley, Jr,* 11 FCC 3, 12-14 (1945).

[67]Pub.L. No. 82-554, 66 Stat.711, See e.g. S. Rep. No. 44, 82d Cong., 1st Sess. 8-9 (1951)

[68]H. Rep. No.1750, 82nd Cong. 2d Sess. (1952), 52 U.S.Code Cong. & Ad. News, 82nd Cong. 2d Sess. (1952) at 2245-2256.

[69]Sewell, Stephen F., *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934,* 43 Federal Communications Law Journal No.3 at 277, 384-285 (July 1991).

Under the proposed waiver standard, the FCC is required to examine whether there is another potential buyer for the station, thereby raising complex factual questions. The Commission must examine whether the out-of-market station is a ready, willing, and able buyer. It also must examine whether it has made an offer to the seller that will not result in an artificially depressed price. Such an inquiry conflicts with both the letter and spirit of the 1952 Amendments.

The problems are exacerbated because the Commission will apparently accept petitions to deny on this issue. Unfortunately the *Report and Order* never outlines the requirements for making a *prima facie* case. Will the Commission accept a petition merely on a petitioner's assertion that there is another unnamed, potential out-of-market buyer for the station? Will the FCC require those filing petitions to deny to prove that there is a specific out-of-market buyer that meets all the requisite qualifications, including the ability to pay a reasonable price for the station?

Permitting petitions to deny on this specific waiver element will lead the FCC into a quagmire. The potential for mischief by competitors and other groups is tremendous. The result could be a complete breakdown of the transfer process. All of this is further evidence that this element of the FCC's waiver process runs afoul of the Communications Act. The 1952 Amendments were designed to permit the alienation of broadcast stations and get the FCC out of complex factual inquiries between competing purchasers in the transfer process. This element of the waiver process should be eliminated.

## V. Restrictions on Transferability Should be Eliminated

One of the more irrational components of the *Report and Order* is its treatment of new duopoly combinations when they are subsequently transferred. According to the FCC, a combination may be transferred only if the combination meets either the new duopoly standard or comports with the waiver criteria at the time of the subsequent transfer. [70] This element leads to some irrational results. Consider the following situations:

- Two stations combine in a market where there are eight independent voices. At some future time, however, the number of voices drops below eight. (This could occur if another station went dark or additional combinations were permitted under failed or failing station waivers.) Thus, due to circumstances beyond the combined stations' control, the stations may not be sold as a combination.

- A top four station with strong ratings/audience share acquires a weak station. After years of investment, the weak station becomes one of the top four stations in the market. Nonetheless, the stations may not be sold as a combination. The only way the stations may be sold as a combination is if one of the stations reverted to its "weak" station status.

- A station in a market with less than eight voices obtains a "failed or failing" station waiver and combines with another station. After significant investment the "failed or failing" station becomes profitable. In order to sell the stations as a combination, one of the stations must revert to its "failed or failing" status.

- Two stations in a small market entered into a local marketing agreement prior to November 1996. Under the FCC rules the stations may be sold to a third party and keep the LMA intact (at least for five years). If the same stations formed a duopoly, however, they may be prohibited from selling the stations as a combination.

These situations demonstrate that the FCC's restrictions on the transfer of duopoly combinations is arbitrary and capricious. In the first case, FCC decisions regarding other stations in a market would preclude a broadcaster from selling the stations as a combination. In the

[70] *See e.g., Report and Order* at ¶ 87.

second and third instances a broadcaster's investment in providing more highly rated programming or saving a financially distressed station would be rewarded by prohibiting the combination's sale. Finally after attempting to move away from local marketing agreements, the FCC's restrictions on the sale of duopolies, creates an incentive for stations to keep their LMA status.

As the FCC has recognized on numerous occasions, restrictions on alienation stifle investment. The very reason for combining in markets is to harness the efficiencies inherent in operating two stations. The whole is greater than the sum of its parts. The value is lost if the stations must be split up at the time of sale. Indeed, transfer restrictions will hamper up-front investment in these facilities. Investors are unlikely to invest if there may be limitations on a subsequent transfer.

Apart from up-front investment, the transfer restrictions create a perverse incentive in the market. For example, an entity wishing to sell its stations as a combination has every incentive not to invest in top quality programming. This could happen in markets where a seller must meet the failed or failing station test in order to sell the stations as a combination. It could also happen in cases where a station must lower its audience share below the top four, in order to be sold as a combination.

From a strict diversity standpoint, transfer restrictions make little sense. On the one hand, the Commission finds that diversity will not be harmed and the public interest served by permitting a combination in a market. Once this is established, it should not matter who subsequently owns the station. The number of voices in the market would not be changed. The *Report and Order* provides no public interest justification for attempting to terminate these combinations simply because the combination is being sold to another party. On the contrary, forcing these combinations to "split apart" upon a sale, harms the public interest by disrupting service and eliminating the efficiencies which lead to higher levels of performance.

## VI. The Commissions Analysis Regarding UHF/VHF Comparability Should Be Revised

ALTV understands the Commissions desire to avoid basing the duopoly rule on a station's UHF status. Nonetheless, we are troubled by the Commission's UHF station analysis in the *Report and Order*[71]

The Commission's analysis goes too far in attempting to equate UHF and VHF facilities. On this point, the *Report and Order* is somewhat misguided. In today's world, VHF stations still enjoy significant advantages over UHF facilities.[72] We urge the Commission to avoid reaching premature conclusions regarding the equivalency between UHF and VHF facilities.

The *Report and Order* first observes that some UHF stations are financially successful, are network affiliates and part of large station groups.[73] While this may be true for come UHF stations, it still does not mean that UHF stations are comparable to their VHF counterparts.

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[71]*Report and Order* at ¶ 89.

[72]These issues are part of the FCC's *Biennial Review*, which is examining the UHF discount. In that proceeding, ALTV demonstrated that UHF stations remain handicapped relative to their VHF counterparts, thereby warranting a continuation of the UHF discount. *See,* ALTV Comments to Notice of Inquiry in MM Docket No. 98-35, July 21, 1998. (hereinafter cited as *ALTV Biennial Comments*) These comments contain a full discussion of the continued problems of UHF stations.

[73]Report and Order at ¶ 89.

There are fundamental technical and economic realities which make UHF stations less profitable. For example, they require more electricity to operate, their signal does not propagate as well as a VHF signal.

The limitations imposed on the analog UHF band are a matter of physics and have not changed over time. This handicap was discussed extensively in the FCC's *1980 Network Inquiry*.

**Modified Grade B Outdoor Contour Line Radius**[74]

| | |
|---|---|
| **Low VHF (2-6)** | **76 miles** |
| **High VHF (7-13)** | **72 miles** |
| **UHF (14-69)** | **45 miles** |

These coverage limitations translate directly into increased costs and reduced economic performance.

> Thus, UHF transmission at the maximum authorized ERP requires 10 times more electrical power than is required for low VHF transmission at the maximum authorized ERP. However, the cost differential is, in reality, much greater since low VHF amplifiers are much more efficient than UHF amplifiers. As a result, UHF transmission may require 20-50 times more electrical power than lower VHF stations operating at full power. When total operating costs (including annualized capital equipment costs) are considered, a full power UHF transmitter is over eight times more expensive to operate than a full-power VHF transmitter.[75]

As a result most UHF stations operate at less then full power. While the market has become more competitive, this basic fact has not changed.

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[74]Network Inquiry Special Staff, Federal Communication Commission, *New Television Networks: Entry Jurisdiction, Ownership and Regulation*, Vol 1 at 70 (1980).

[75]*Id.* at 72

The *Report and Order* notes that cable carriage has helped to close the gap between UHF and VHF facilities. First, in order to be carried, a station must provide a Grade B signal to a cable headend. Because of the costs, however, most UHF stations do not operate at full power and their Grade B signals do not cover the same geographic area as their VHF brethren. As a result UHF stations may not be meet the requisite qualification to be carried in parts of their local market. Moreover, cable systems can petition to have a community excluded from a broadcaster's market.[76] This is more likely to happen to UHF stations because they initially had smaller coverage areas to begin with. In short, cable carriage is not the great equalizer envisioned by the *Report and Order*.

The *Report and Order* also states that the move to digital television will correct the disparity between UHF and VHF stations. To the contrary, the move to digital television could very well exacerbate the disparity. First, the DTV coverage areas assigned in the table of allotments replicated the actual coverage areas of existing analog stations. Because VHF analog stations currently have larger coverage areas, they were granted larger coverage areas in the DTV world. Second, the power increases afforded to UHF stations did not rectify this fundamental problem. The coverage areas are *not* the same. Moreover, when increasing power through the use of tilt beam antennas, the UHF station cannot increase its assigned coverage area or cause additional interference to surrounding stations. Third, there is every indication that existing VHF stations will ultimately move their digital facilities back to the VHF ban, thereby perpetuating the disparity. Fourth, the only opportunity for equal treatment will be if UHF stations are able to

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[76] *See e.g. Dynamic Cablevision of Florida, Ltd.* 8 CR 1172 (1997)

maximize their facilities after analog spectrum is returned. However, many UHF stations may be unable to maximize because the Commission intends on giving lower power stations Class A status and protecting the LPTV contours from DTV interference. Finally, many UHF stations will be forced to move their digital facilities several times in order to move into core spectrum areas. DTV will not solve the UHF disparity. It may make the situation worse.

## VII. Conclusion

Accordingly, ALTV respectfully requests that the Commission revise it newly adopted duopoly rule consistent with the position stated herein.

- Permanently grandfather all existing local marketing agreements. This includes all local marketing agreements entered into prior to the adoption date of the Report and Order.
- Eliminate the "eight independent voice standard."
- To the extent the Commission decides to continue applying a voice standard, then all competing media should be counted as a voice. This includes cable television, DBS, MMDS, radio, newspapers, magazines and the Internet.
- The waiver process should be revised. Stations in small and medium sized markets should not be placed in financial distress before they are allowed to enter into combinations. The requirement that stations must first look for an "out-of-market" buyer should be eliminated
- Limitations on the transferability of newly created duopoly combinations should be eliminated.
- The Commission should revise its analysis regarding the equivalency of UHF and VHF facilities.

We trust the FCC will accept these proposed changes. These modifications will insure that viewers in all television markets have access to the best free, over-the-air television service.

Respectfully Submitted
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